

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

SAVINA R. WHITNEY,)
)
Plaintiff,) No. 03:10-cv-01403-HU
)
vs.)
)
MICHAEL J. ASTRUE,) **FINDINGS AND RECOMMENDATION**
Commissioner of Social Security,)
)
Defendant.)

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HUBEL, United States Magistrate Judge:

The plaintiff Savina R. Whitney seeks judicial review pursuant to 42 U.S.C. § 405(g) of the Commissioner's final decision denying her applications for Disability Insurance ("DI") benefits under Title II of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental Security Income ("SSI") under Title XVI of the Act. Whitney argues the Administrative Law Judge ("ALJ") erred in failing to evaluate her mental residual functional capacity properly, finding her testimony to be less than fully credible, improperly rejecting a lay witness's statement, and improperly concluding that Whitney is able to work. See Dkt. ##15 & 20.

I. PROCEDURAL BACKGROUND

Whitney protectively filed applications for DI and SSI benefits on April 24, 2007, at age 39, claiming a disability onset date of November 1, 2006. (A.R. 135-37, 143-45¹) She later amended her application to claim a closed period of disability between November 1, 2006, and June 30, 2008. (A.R. 37) Whitney is

¹The administrative record was filed electronically using the court's CM/ECF system. Dkt. #11 and attachments. Pages of the record contain three separate page numbers: two located at the top of the page, consisting of the CM/ECF number (e.g., Dkt. #11-6, Page 15 of 24), and a Page ID#; and one located at the lower right corner of the page, representing the numbering inserted by the Agency. Citations herein to "A.R." refer to the agency numbering in the lower right corner of each page.

1 5'7" tall, and at the time of her applications, she weighed 138
2 pounds. (A.R. 161) She claims she was disabled during the closed
3 period due to bipolar disorder and "3 herniated discs" which cause
4 low back pain. (A.R. 162)

5 Whitney's applications were denied initially and on
6 reconsideration. (A.R. 76-79, 80-88) She requested a hearing
7 (A.R. 97), and a hearing was held on March 29, 2010, before an ALJ.
8 (A.R. 32-75) Whitney was represented by an attorney at the
9 hearing. (See A.R. 32) Whitney testified at the hearing, and a
10 Vocational Expert ("VE") also testified. *Id.* On August 19, 2008,
11 the ALJ issued his decision, finding that although Whitney has
12 severe impairments that prevent her from returning to any of her
13 past relevant work, she retains the residual functional capacity to
14 make a successful adjustment to other work, citing examples of
15 semiconductor assembler, surveillance monitor, and meter reader.
16 The ALJ therefore concluded that Whitney was not disabled during
17 the closed period at issue. (A.R. 15-27) Whitney appealed the
18 ALJ's decision, and on September 10, 2010, the Appeals Council
19 denied her request for review, making the ALJ's decision the final
20 decision of the Commissioner. 20 C.F.R. §§ 404.981, 416.1481.

21 Whitney filed a timely Complaint in this court, seeking
22 judicial review of the Commissioner's final decision. Dkt. #2.
23 Whitney filed a brief in support of her request for review on
24 August 20, 2011. Dkt. #15. The Commissioner filed a responsive
25 brief on October 24, 2011. Dkt. #17. Whitney filed a reply on
26 November 9, 2011. Dkt. #20. The matter now is fully briefed, and
27 I submit the following Findings and Recommendation pursuant to 28
28 U.S.C. § 636(b)(1)(B).

3 - FINDINGS & RECOMMENDATION

II. FACTUAL BACKGROUND

A. Summary of the Medical Evidence²

On November 16, 2006, Whitney was seen by psychologist Wendy Bourg, Ph.D. at Summit Research (Oregon) Inc., to be evaluated for inclusion in a clinical trial of a medication for bipolar disorder. Whitney was noted "to be in a manic state," with rapid, pressured speech; jumping from topic to topic; darting eyes; and fair to poor judgment. She was diagnosed with "Bipolar disorder, manic state, moderate to marked," and her screening interview and testing indicated she met the criteria for inclusion in the medication study. (A.R. 233, 239; see A.R. 234-40; 272) She began participation in the study, and by December 13, 2006, she and her partner, Gail, reported that she was "very much improved, virtually all the way well." (A.R. 251)

On December 19, 2006, Whitney reported continued improvement in her mood and other symptoms, but noted she was experiencing afternoon fatigue. (A.R. 252) Similarly, on December 27, 2006, she reported that all of her symptoms were improved except for energy and motivation. Her dosage of Abilify was decreased in an attempt to alleviate her fatigue, but the fatigue persisted, and Whitney was still complaining of fatigue on January 2 and 11, 2007. (A.R. 253, 256-58) Her Abilify dosage was increased again, and on January 25, 2007, she reported being "virtually symptom-free." (A.R. 259) On February 15, 2007, Whitney "came in with her partner

²Because Whitney is seeking a disability determination for the closed period from November 1, 2006, to June 30, 2008, medical treatment records dated 12/02/1994 to 12/28/2001, from Sierra Park Clinics are not summarized here. (See A.R. 323-61)

1 and both were in good moods. They were both talking and laughing
2 a lot." Whitney reported "no depressed mood but some irritability
3 and lassitude." (A.R. 265) Her participation in the study ended
4 in March 2007. She entered an aftercare program at her "optimal"
5 medication dosage of Abilify 30 mg and Lamictal 100 mg. (A.R. 272)

6 Whitney was seen in the aftercare program for a recheck on
7 May 2, 2007. She reportedly had "developed a gastroenteritis
8 illness," and had discontinued the Lamictal "abruptly." (A.R. 316)
9 She was started on Zoloft, but it "made her feel angry, irritable,
10 and flat," so after five days, she resumed taking Lamictal along
11 with the Zoloft. The drug combination did not improve her symp-
12 toms, so she discontinued the Zoloft and continued on the Lamictal.
13 She reported ongoing fatigue. (*Id.*)

14 On May 12, 2007, Whitney was seen by William Hills, M.D., a
15 board-certified neurologist, for a consultative physical examina-
16 tion. (A.R. 273-78) Whitney provided the following history:

17 [I]n approximately 1994 or 1995 she had
18 herniated 2-3 disks in her lower back; she
19 states L3-L5. She was seen by a physician in
20 California and was told that she needed
21 surgery. However, she did not undergo sur-
22 gery; rather was treated with oral steroids,
23 muscle relaxants, nonsteroidal antiinflam-
24 matory drugs, and rehabilitation over the past
25 10 years. She states she experiences chronic
26 lower back pain that flares up every month
27 with her menses and is exacerbated by overuse.
28 The monthly flare-ups are simply significant
soreness in her lower back. However, she
states if she overuses her back, carries more
than 20 pounds of weight, or sneezes or coughs
just right she will have significant pain in
the lower back causing loss of control of her
bilateral lower extremities that requires at
least two days of rest lying flat on her back
with pillows under her knee. She states
during these periods she is able to stand and
maneuver to the restroom. However, must "baby
it." When she does have the severe lower back

1 pain, it often times will radiate to her left
2 lower extremity and she will have cramps in
3 her left calf as well. She states over the
4 past 10 years she has had approximately five
5 flare-ups that have required complete bedrest
6 for approximately two weeks. During these
7 times, she is unable to walk, but reports
8 being able to crawl. She also reports that
she has bilateral lower extremity numbness
when sitting in certain positions. However,
this numbness is relieved when she gets up and
moves around. She states that she is not able
to squat due to her lower back pain and she is
only able to stand for approximately one hour
before her back begins to ache.

9 (A.R. 273-74) Whitney listed her current medications as Seroquel
10 300 mg at night, which she had just started taking one to two weeks
11 earlier; Zoloft, currently being tapered; Ibuprofen 800 mg three
12 times daily; and an Albuterol inhaler as needed. (A.R. 274)

13 Dr. Hills's examination revealed a woman in no acute distress,
14 slightly disheveled, emotionally stable, who moved well, sat
15 comfortably; and transferred from the chair to the examination
16 table, walked about the room, and removed her shoes, all without
17 difficulty. She had average ranges of motion; positive straight-
18 leg-raising at 50 degrees on the right in a supine position,
19 negative on the left; and positive on the right at 90 degrees in a
20 sitting position, negative on the left. She had good grip
21 strength, and no difficulty grasping and manipulating both large
22 and small objects. (A.R. 274-76) She reported tenderness in her
23 lumbar spine on palpation, and "objectively demonstrate[d]
24 decreased light touch and temperature sensation on the dorsum of
25 her left foot." (A.R. 277)

26 Dr. Hills diagnosed Whitney with "[l]ower back pain." (Id.)
27 He noted the following conclusions from his examination:
28

1 The number of hours [Whitney] could be
2 expected to stand and walk in an eight-hour
3 workday is approximately six hours with
4 frequent breaks.

5 The number of hours [she] would be able
6 to sit in an eight-hour workday is not
7 restricted.

8 There are no assistive devices.

9 The amount of weight [she] could lift or
10 carry is approximately 10 pounds frequently
11 and 10-20 pounds occasionally.

12 There are no postural limitations on
13 bending, stooping and crouching.

14 There appear to be no manipulative limi-
15 tations or relevant visual or communicative
16 limitations. Workplace environmental limita-
17 tions may include requiring appropriate lumbar
18 support in a chair.

19 Miss Whitney's lower back complaints are
20 very characteristic for claimants with lumbar
21 degenerative disk disease. Her physical exam
22 is significant for positive straight leg raise
23 on the right and it is likely that she
24 requires further evaluation and would benefit
25 from appropriate treatment. It is not unrea-
26 sonable at this point to state the amount of
27 time she spends standing or walking would be
28 limited and the amount of time spent sitting
 would need to be interrupted by frequent
 breaks and assisted with appropriate lumbar
 support. In addition, she describes having
 bipolar disorder and while she is emotionally
 stable during my examination it is obvious
 there may be some component of disorganization
 as her clothing is soiled and her appearance
 slightly disheveled.

(A.R. 277-78)

On May 16, 2007, Whitney was seen in the aftercare program for
followup of her bipolar disorder. She wanted to discontinue the
Seroquel because it was "making her very lethargic." (A.R. 315)
She was taken off Seroquel and Lamictal, for a trial of only
Abilify at an upward tapering dose for two weeks. She was enrolled
in an assistance program to help pay for the Abilify. (Id.)

X-rays of Whitney's lumbar spine on May 18, 2007, showed
"Transitional situation[] of completely sacralized fifth lumbar

1 vertebra,"³ and "Advanced degenerative change at the disc of the
2 L4-5 level." (A.R. 279)

3 On May 30, 2007, psychologist Paul Rethinger, Ph.D. reviewed
4 the record and completed a Psychiatric Review Technique form
5 regarding Whitney. (A.R. 280-93) He evaluated Whitney's Bipolar
6 Disorder under Listing 12.04, opining Whitney would have mild
7 functional limitations in her activities of daily living, and
8 moderate functional limitations in the areas of maintaining social
9 functioning, and maintaining concentration, persistence, or pace.
10 (A.R. 290) He noted no history of decompensation or emergency room
11 visits, and noted Whitney's symptoms appeared to be under fair
12 control with consistent treatment and medications. (A.R. 292)

13 Dr. Rethinger also completed a Mental Residual Functional
14 Capacity Assessment form (A.R. 302-05), opining Whitney would be
15 moderately limited in her ability to carry out detailed
16 instructions, interact appropriately with the general public, and
17 get along with coworkers or peers without distracting them or
18 exhibiting behavioral extremes. He did not find that Whitney would
19 be significantly limited in any other work-related mental activity.
20 (*Id.*) He opined Whitney "would do best performing tasks at a
21 consistent and unrushed pace," limiting herself to completing
22 "simple 1-2 step tasks on a consistent basis in a normal 40 hour
23 work week." (A.R. 304) He further opined she should be "limited
24 to occasional public and coworker contact." (*Id.*)

25
26 ³"When the lumbar segment is completely sacralized," as noted
27 by the radiologist (A.R. 279), "disc degeneration may occur at the
28 spinal level immediately above it." B. Corrigan & G.D. Maitland,
Vertebral Musculoskeletal Disorders 17 (1998) (available online at
<http://books.google.com/>) (last viewed 11/30/2011).

1 Also on May 30, 2007, J. Scott Pritchard, D.O.⁴ reviewed the
2 record and completed a Physical Residual Functional Capacity
3 Assessment form. (A.R. 294-301) He opined Whitney would be able
4 to lift up to fifty pounds occasionally and twenty-five pounds
5 frequently; stand and/or walk and sit for about six hours, each, in
6 an eight-hour workday; and push/pull without limitation. (A.R.
7 295) He opined she would be able to climb ramps/stairs, balance,
8 kneel, and crawl frequently; and climb ladders/ropes/scaffolds,
9 stoop, and crouch occasionally. (A.R. 296) He noted no other
10 functional limitations. Dr. Pritchard noted Whitney had advanced
11 degenerative disc disease in one segment of her lumbar spine, with
12 "associated sclerotic changes about the end-plates"; however, she
13 had "full lumbar flexion with normal gait/station/tandem." (A.R.
14 301) He noted Whitney engaged in a full range of daily activities,
15 she had not sought consistent treatment for her back pain, and she
16 only took over-the-counter medications for her back pain. *Id.* He
17 disagreed with Dr. Hills's conclusion that Whitney would be limited
18 to light work, instead opining she would be capable of a moderate
19 range of functioning, with limitations on stooping and crouching.
20 *Id.*

21 On June 4, 2007, Whitney was seen for followup in the mental
22 health aftercare program. She was taking Abilify 20 mg/daily, and
23 reported feeling very tired on that dosage. She was "sleeping late
24 every day," felt agitated, and got angry easily. Her Abilify
25 dosage was decreased to 15 mg/daily. (A.R. 314) She reported no
26

27 ⁴Dr. Pritchard practices internal medicine. He has been a
28 medical consultant for the Oregon Department of Disability Services
since 1997. See <http://www.dhs.state.or.us/nade/speakers.html>.

1 new symptoms or complaints on June 14, 2007, and her Abilify dosage
2 was continued without change. (A.R. 313)

3 On November 20, 2007, internist Sharon B. Eder, M.D. reviewed
4 the record and concurred with Dr. Pritchard's conclusions regarding
5 Whitney's physical functional capacity. (A.R. 317) The same date,
6 Peter LeBray, Ph.D., a clinical psychologist, reviewed the record
7 and concurred with Dr. Rethinger's previous conclusions regarding
8 Whitney's mental functional capacity. (A.R. 318) Dr. LeBray noted
9 Whitney's mood was "more stable," and Whitney lacked any "clear
10 cognitive deficits." She also was noted to be "somewhat socially
11 avoidant, rel[ying] much on her partner and given to bouts of
12 irritability." (A.R. 322) Dr. LeBray recommended Whitney have a
13 job not requiring close social interaction due to the possibility
14 that she could be distracted occasionally by "affective distress."
15 (*Id.*)

16 The record contains no further medical evidence of any
17 treatment Whitney received during the closed period at issue in
18 this case. There is a significant gap in Whitney's medical
19 records, from June 14, 2007, to November 18, 2009, when she was
20 seen by Blake A. Nonweiler, M.D., an orthopedic surgeon, following
21 a shoulder injury at work. The record contains Dr. Nonweiler's
22 treatment notes, as well as treatment notes from Marc A. Wagner,
23 M.D., a physical medicine and rehabilitation specialist Whitney saw
24 for pain management of her right shoulder pain. Because these
25 treatment records post-date the closed period at issue in this case
26 by more than a year, they are not summarized here.

27 / / /

28 / / /

10 - FINDINGS & RECOMMENDATION

1 **B. Summary of the Vocational Evidence**

2 Whitney has past relevant work as a heavy equipment operator
3 for a paving company, a bartender/waitress, a car attendant for an
4 auto detailing company, a gasoline attendant, a cashier, a motel
5 housekeeper, a site attendant/supervisor at a family-owned landfill
6 business, and a waste disposal attendant where she cleaned "porta-
7 potties." (See A.R. 61, 150, 180)

8 From the VE's classification of these jobs, the ALJ concluded
9 Whitney's past relevant work included "Heavy Equipment Operator,
10 Paving Equipment Operator, Waste Disposal Attendant, and Cashier
11 II." (A.R. 66) He noted her work history included both unskilled
12 and skilled positions. The ALJ asked the VE the following
13 hypothetical question:

14 For a first hypothetical, let's assume that
15 this is a person who is capable of . . .
16 essentially medium level work, that is to say
17 a person who could lift 50 pounds occasionally
18 and 25 pounds frequently, a person, who in the
19 course of an eight hour work day, could stand
20 and walk six hours and could also sit six
21 hours. This would be a person who would be
22 capable of frequently climbing ramps and
23 stairs, balancing frequently, frequently
24 kneeling and frequently crawling. A person
25 who could occasionally climb ladders, ropes,
26 and scaffolds. A person who could occasion-
27 ally stoop and occasionally crouch. Let's
28 also assume that this is a person who, during
the relevant timeframe, would have been capa-
ble of unskilled work consisting of simple
routine tasks with simple instructions. A
person who would have been limited to occa-
sional contact with the general public and
occasional contact with supervisors and
coworkers. If that were this person's, this
hypothetical person's capabilities, would this
person be able to perform any of the
claimant's past relevant work?

(A.R. 66-67)

1 The VE responded that the hypothetical individual would be
2 unable to perform any of Whitney's past relevant work, noting three
3 of her past jobs were skilled, and the fourth, the Cashier II,
4 required more than occasional contact with the public. (A.R. 67)
5 However, the individual would be able to perform other work such as
6 Sweeper/Cleaner Industrial, an unskilled, medium job; Assembler
7 Small Products, an unskilled, light job; and Packager/Hand, an
8 unskilled, medium job. (A.R. 67-68)

9 The ALJ then asked the VE to consider a second hypothetical:

10 Once again, let's assume that this is a person
11 who would be limited to unskilled work
12 consisting of simple routine tasks with simple
13 instructions. Once again, let's assume that
14 this is a person who should have no more than
15 occasional contact with the general public, no
16 more than occasional contact with coworkers
17 and supervisors. Let's assume that this is a
18 person who could . . . lift ten pounds
19 frequently and ten to 20 pounds occasionally,
20 a person who, in the course of an eight hour
21 work day, could stand and walk for six hours
22 with frequent breaks, a person who's [sic]
ability to sit would not be restricted in
terms of time but who would require lumbar
support for sitting. So bottom line is, this
is a person probably with somewhat less than
light lifting capability, a person who could
stand and walk six hours but who would require
frequent breaks and in terms of sitting,
someone who would require lumbar support along
with mental health limitations that I just
went over. I assume, once again, past rele-
vant work would be precluded for the same
reasons?

23 (A.R. 68-69) The ALJ clarified that by "frequent breaks," he meant
24 "a break of one to two minutes to stand and stretch every half hour
25 in addition to the normal or typical breaks." (A.R. 69)

26 The VE indicated the second hypothetical individual would not
27 be able to work at any of Whitney's past relevant jobs, or in the
28 three jobs previously identified in response to the first

1 hypothetical question. However, the individual would be able to
 2 work at other jobs including Assembler Semiconductor, a sedentary,
 3 unskilled job⁵; Surveillance Systems Monitor, a sedentary,
 4 unskilled job; and a Meter Reader, a light, unskilled job⁶. (A.R.
 5 69-71)

6 Whitney's attorney asked the VE to consider the ALJ's second
 7 hypothetical, but with a moderate limitation in the ability to
 8 concentrate that would result in about a 20% reduction in
 9 productivity. (A.R. 71) The VE responded that there is virtually
 10 no job, of any classification, where a person remains on-task or is
 11 productive 100% of the time. (A.R. 72) However, if the indi-
 12 vidual's concentration difficulties would render the person
 13 incapable of performing routine, repetitive work, then the person
 14 would be unable to sustain gainful employment. (A.R. 73)

15 Returning again to the ALJ's second hypothetical individual,
 16 if the individual "failed to show up for work about two days a
 17 month due to medical reasons," on an ongoing basis, the VE would
 18 deem that rate of absenteeism to be excessive for unskilled work,
 19 precluding employment. (A.R. 74)

20 / / /

21 / / /

22 / / /

24 ⁵The VE noted the *Dictionary of Occupational Titles* ("DOT")
 25 was last updated in 1986, and indicated the Assembler Semiconductor
 26 job was semi-skilled. However, more recent publications by the
 State of Oregon Employment Department indicated the job could be
 learned in 30 days or less, making it an unskilled job. (A.R. 70)

27 ⁶Similarly, although the DOT classifies the Meter Reader job
 28 as semi-skilled, more recent publications would classify the job as
 unskilled. (A.R. 71)

1 **C. Whitney's Testimony**

2 **1. Written testimony**

3 On a Pain Questionnaire dated May 4, 2007, Whitney indicated
4 she had a sharp, "pinching of nerve" type of pain in her lower back
5 and down her legs. She experienced the pain intermittently,
6 anywhere from once or twice a month, to "2 or 3 weeks of the
7 month." (A.R. 177) Lifting and carrying, standing for a long
8 time, vacuuming, climbing stairs, sneezing, coughing, and cold
9 weather all caused her to have pain. Getting up from a seated
10 position made the pain worse. She got some relief from lying in a
11 fetal position, or lying on the floor with her legs elevated. (*Id.*)
12 She took Ibuprofen and Tylenol daily for the pain. She could be up
13 and active for about an hour before she needed to rest, but only
14 rarely was she unable to finish a task she started. She no longer
15 was able to go hiking, an activity she used to enjoy. She could
16 walk one city block without resting. She prepared her own meals.
17 (A.R. 178-79)

18 On a Function Report, also dated May 4, 2007, Whitney
19 described her daily activities as varied. She usually got up,
20 drank coffee, watched some television, and then did some type of
21 household chore such as dishes, laundry, or vacuuming. She watched
22 more television and then fixed lunch, sat on her porch and smoked
23 cigarettes, and sometimes read the newspaper. She stated most of
24 her day was "spent with pacing, somewhat lost and trying to figure
25 out why." (A.R. 192) She had no difficulties with her personal
26 care. She indicated her conditions affected her sleep, but did not
27 provide any explanation. (A.R. 193) She similarly indicated she
28 needed reminders to take care of personal needs and grooming, but

1 failed to indicate what type of help or reminder was needed, or for
2 what types of tasks. (A.R. 194) She did her own cooking and
3 housework, and she did her own shopping, which took her an "hour or
4 two." (A.R. 195) She managed her own money, and drove a car. She
5 indicated she went outside "10-20 times a day to smoke." (*Id.*)

6 She used to enjoy riding bikes, fishing, and camping, but she
7 was unable to do those things anymore. She felt she was less
8 sociable, not wanting to be around anyone. She had problems
9 concentrating and remembering things. On this form, she indicated
10 she could walk a quarter mile before having to stop and rest, and
11 she had to rest five minutes before she could resume walking. She
12 followed written and spoken instructions "pretty well." (A.R. 196-
13 97) She had become "afraid to work and drive and do things [she
14 had] done before." (A.R. 198) She did not handle stress as well
15 as she used to. (*Id.*)

16 17 **2. Hearing testimony**

18 At the time of the ALJ hearing, Whitney was 42 years old, 5'7"
19 tall, and weighed about 125 pounds. She was living in a house in
20 Terrebonne, Oregon, with her 18-year-old daughter, and a roommate.
21 Whitney has two other children, ages 20 and 25 at the time of the
22 hearing, who did not reside with her. (A.R. 39-40)

23 Whitney earned a G.E.D. in 1995. She later completed a
24 correspondence course in Landfill Management through Wisconsin
25 University, and received a Certificate of Completion from the
26 course. When she was in middle school, Whitney was placed in
27 remedial reading and math classes, but she is able to read and
28 write. (A.R. 40-41)

1 At the time of the hearing, Whitney was working at two jobs:
2 as a Courtesy Clerk at a Safeway store, and as a Roller Operator
3 for Central Oregon Pavers, the latter being a seasonal job. (A.R.
4 41-42, 55) As a Roller Operator, she had to operate heavy
5 equipment, "rolling the rock into the tack." (A.R. 55) If she
6 encountered a "large bump," she had to climb down off the equipment
7 and try to rake or shovel the bump out smooth. (*Id.*) When she
8 finished her shift, her back would hurt. (A.R. 56)

9 Whitney was not working during the time period for which she
10 seeks benefits, and she does not believe she was capable of working
11 during that time due to back pain and depression. (A.R. 42-43)
12 She did not have insurance, so she entered a research study to get
13 medication for "bipolarism and depression." (A.R. 43) She also
14 received counseling as part of the program. (*Id.*) Before she
15 started in the program, she was experiencing "[m]anic highs and
16 lows on a continuous basis." (A.R. 50) She would cycle through
17 the highs and lows "[a] couple of times a week," so each week, she
18 would have a couple of good days and a couple of "really bad" days.
19 (*Id.*) When she was in a manic state, Whitney felt extremely
20 positive, like she could "conquer the world." (*Id.*) She had a lot
21 of energy, great plans and goals, and believed she would "do just
22 fine." (A.R. 50-51) She did not get much sleep, and she had a
23 problem with gambling. When the manic episode ended, she would
24 "crash." She wanted to give up on everything, and her "head was
25 full [of] garbage that was an impossibility, crying, suicidal
26 thoughts." (A.R. 51) She would lock herself in her room, not eat,
27 and not want to talk to anyone. Though she was tired, she was
28 unable to sleep. She had no ability to concentrate, and her

1 thoughts were negative and racing. It was when she came close to
2 suicide that she called to sign up for the medication study. (A.R.
3 51-52)

4 When the medication study ended, Whitney continued to take the
5 medications. They helped her stop the high-low cycle and stopped
6 her mind from racing. (A.R. 52) She was able to sleep better and
7 rest better. (A.R. 53)

8 During that time period, she had constant back pain, which she
9 rated at a level of 5 on a 10-point scale. However, she was not
10 receiving any type of treatment for her back, and took only over-
11 the-counter Tylenol for her back pain. (A.R. 44-45) She also did
12 stretching exercises, and used Icy Hot, heat rubs, and thermal
13 packs. (A.R. 49) Her pain would worsen if she sneezed or coughed,
14 sometimes rising to the top of the pain scale. When her pain was
15 exacerbated to that degree, the severe pain would last "approxi-
16 mately a week or two." (A.R. 46) To relieve pressure in her back,
17 she had to lie on the floor on her back with her feet elevated.
18 She had to "crawl to the bathroom." (*Id.*) Whitney stated she had
19 two such episodes during the nineteen-month time period at issue,
20 where she was down for about a week each time. She did not go to
21 the emergency room because she could not afford it. (*Id.*)

22 Other things that made her pain worse included weather
23 changes; lifting something heavy, like a gallon of milk; and
24 twisting the wrong way. She sometimes would sleep wrong, and wake
25 up stiff and in pain. (*Id.*) Stooping and kneeling actually helped
26 her pain somewhat, relieving "the pinching." (A.R. 47) If she had
27 to perform a twisting movement, she had to twist her whole body;
28 she could not leave her feet stationary and only twist her upper

1 body. (A.R. 46-47) She stated she would have been unable to work
2 at a job requiring repeated twisting motions, like stocking
3 shelves. (A.R. 47)

4 She could sit for ten to fifteen minutes before having to
5 change positions, but for the most part, she was "constantly
6 moving." (*Id.*) She could stand for ten to fifteen minutes before
7 having to rest, and walk for half a mile before resting, although
8 she would be stopping to bend down and stretch her back during the
9 walk. (A.R. 48) She had to pull herself up and down stairs using
10 her arms because she lacked strength in her right leg. When she
11 tried to raise her right leg, it caused a pinching sensation in her
12 low back, and sometimes her right leg would "give out." (A.R. 48-
13 49) Her back pain radiated into both of her legs, and her legs
14 would "go numb." (A.R. 49)

15 Whitney stated she was unable to grocery shop regularly during
16 the time period in question. She prepared small meals and could do
17 the dishes, but she could not sweep the kitchen or vacuum the
18 floors due to pain. She also could not scrub the bathroom, because
19 "getting down, bending over, and scrubbing" were impossible for
20 her. (A.R. 53-54) Her daily activities during this period
21 consisted mostly of sitting and reading or watching television.
22 (A.R. 54)

23 She stated her back pain affected her ability to concentrate,
24 noting it is "hard to focus on things when you're constantly moving
25 and having to adjust your body just to keep that . . . certain
26 pinch that you know is going to limit you from moving for quite a
27 while." (A.R. 55)

1 Whitney stated her current pain and limitations are largely
2 unchanged from the closed period at issue. She still has the same
3 kind of pain. Her attorney asked how she was working despite the
4 pain, and Whitney responded, "[T]he difference is I have to
5 survive[.]" (A.R. 48) However, she stated she is moving
6 constantly, maneuvering her body so her back "doesn't pinch
7 anymore." (A.R. 55)

8 The ALJ noted nothing had happened after June 30, 2008, that
9 allowed Whitney to return to work. She had not had any surgery,
10 physical therapy, or different medications, although she had
11 started a new medication about three weeks prior to the ALJ
12 hearing. Her back condition basically was the same during the
13 closed period as it was at the time of the hearing when she was
14 working two jobs. (A.R. 57-58)

15 With regard to her mental health condition, Whitney stated the
16 support system she developed during the medication trial, and
17 counseling she received as part of that program, made it easier for
18 her to return to work. (A.R. 58)

19
20 ***D. Third-Party Testimony***

21 Whitney's friend and roommate, Gail L. Stadler, completed a
22 third-party Function Report regarding Whitney on May 4, 2007.
23 (A.R. 169-76) Stadler described Whitney's daily activities as
24 drinking coffee in the morning, pacing back and forth, watching
25 television "on occasion," and sometimes cleaning house. (A.R. 169)
26 She indicated Whitney had chronic mood swings from one moment to
27 the next. According to Stadler, Whitney's personal care had
28 deteriorated. She bathed about twice a week, instead of daily; she

1 could not coordinate the colors of her clothing; she barely cared
2 for her hair; she ate only twice a day or less; and she smoked up
3 to two packs of cigarettes a day. (A.R. 170) She indicated
4 Whitney used to keep up her hygiene, and she used to interact and
5 socialize with others. Now Whitney was forgetful, did not drive
6 much, and suffered from insomnia and restlessness at night. (*Id.*)

7 Stadler indicated Whitney fixed herself simple meals like
8 sandwiches, cereal, or some type of spread on crackers. She stated
9 Whitney had to be reminded to care for herself and her
10 surroundings. According to Stadler, Whitney lacked any patience
11 and was too moody to interact and engage in normal conversation
12 with others. (A.R. 171-72) She stated Whitney occasionally walked
13 or rode a bicycle, but Stadler did not know how often Whitney
14 engaged in these activities. (A.R. 173) She noted Whitney stayed
15 at home most of the time, and preferred to be left alone. (*Id.*)
16 Stadler stated the phrase, "Doesn't play well with others,"
17 appropriately described Whitney. (A.R. 174) In summary, Stadler
18 indicated Whitney was "just not the same person [she] knew and met
19 2 years ago!" (*Id.*)

20 Stadler offered her opinion regarding Whitney's functional
21 abilities. She indicated Whitney could walk about half a block
22 before needing to rest for five to ten minutes. She estimated that
23 Whitney's ability to follow written instructions was "pretty good,"
24 but her ability to follow oral instructions was "not so good."
25 (*Id.*) She opined that Whitney's back problems would affect all of
26 her functional abilities, and her mental problems would affect her
27 memory, concentration, ability to understand and follow instruc-
28 tions, ability to complete tasks, and ability to get along with

1 others. (*Id.*) She stated Whitney did not handle stress well at
 2 all, and she had noticed that Whitney feared losing further control
 3 over herself due to her illness. (A.R. 175)

4 Stadler included the following narrative remarks: "My friend
 5 needs help do [sic] to her illness. Please do what you can for
 6 her. It's very heartbreaking to see such a drastic change in her
 7 moods and behaviors in such a short time!! (I mean over the course
 8 of a 2-year spand [sic]!)." (A.R. 176)

10 ***III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF***

11 ***A. Legal Standards***

12 A claimant is disabled if he or she is unable to "engage in
 13 any substantial gainful activity by reason of any medically
 14 determinable physical or mental impairment which . . . has lasted
 15 or can be expected to last for a continuous period of not less than
 16 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

17 "Social Security Regulations set out a five-step sequential
 18 process for determining whether an applicant is disabled within the
 19 meaning of the Social Security Act." *Keyser v. Commissioner*, 648
 20 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520). The
 21 Keyser court described the five steps in the process as follows:

22 (1) Is the claimant presently working in a
 23 substantially gainful activity? (2) Is the
 24 claimant's impairment severe? (3) Does the
 25 impairment meet or equal one of a list of
 26 specific impairments described in the regula-
 27 tions? (4) Is the claimant able to perform
 28 any work that he or she has done in the past?
 and (5) Are there significant numbers of jobs
 in the national economy that the claimant can
 perform?

1 Keyser, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,
2 1098-99 (9th Cir. 1999)); see *Bustamante v. Massanari*, 262 F.3d
3 949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f)
4 and 416.920 (b)-(f)). The claimant bears the burden of proof for
5 the first four steps in the process. If the claimant fails to meet
6 the burden at any of those four steps, then the claimant is not
7 disabled. *Bustamante*, 262 F.3d at 953-54; see *Bowen v. Yuckert*,
8 482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119
9 (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth
10 general standards for evaluating disability), 404.1566 and 416.966
11 (describing "work which exists in the national economy"), and
12 416.960(c) (discussing how a claimant's vocational background
13 figures into the disability determination).

14 The Commissioner bears the burden of proof at step five of the
15 process, where the Commissioner must show the claimant can perform
16 other work that exists in significant numbers in the national
17 economy, "taking into consideration the claimant's residual
18 functional capacity, age, education, and work experience." *Tackett*
19 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
20 fails meet this burden, then the claimant is disabled, but if the
21 Commissioner proves the claimant is able to perform other work
22 which exists in the national economy, then the claimant is not
23 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.
24 §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

25 The ALJ determines the credibility of the medical testimony
26 and also resolves any conflicts in the evidence. *Batson v. Comm'r*
27 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (citing
28 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)).

Ordinarily, the ALJ must give greater weight to the opinions of treating physicians, but the ALJ may disregard treating physicians' opinions where they are "conclusory, brief, and unsupported by the record as a whole, . . . or by objective medical findings." *Id.* (citing *Matney, supra; Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)). If the ALJ disregards a treating physician's opinions, "the ALJ must give specific, legitimate reasons" for doing so. *Id.* (quoting *Matney*).

The ALJ also determines the credibility of the claimant's testimony regarding his or her symptoms:

In deciding whether to admit a claimant's subjective symptom testimony, the ALJ must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step prescribed by *Smolen*, . . . the claimant must produce objective medical evidence of underlying "impairment," and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Id.* at 1281-82. If this . . . test is satisfied, and if the ALJ's credibility analysis of the claimant's testimony shows no malingering, then the ALJ may reject the claimant's testimony about severity of symptoms [only] with "specific findings stating clear and convincing reasons for doing so." *Id.* at 1284.

Batson, 359 F.3d at 1196.

B. The ALJ's Decision

The ALJ found that Whitney had not engaged in substantial gainful activity during the closed period at issue. He noted, however, that the end of her "alleged closed period of disability coincides with her return to substantial gainful activity," and she remained employed through the date of the ALJ hearing. (A.R. 20) He found, "While [her] earnings within the relevant closed period

1 are technically not substantial gainful activity, the fact that her
2 earning ability increased significantly during the alleged closed
3 period and that she was thereafter able to resume full-time
4 employment on a sustained and competitive basis suggest[s] that she
5 retained the ability to perform at least some basic work activities
6 during the relevant closed period." (A.R. 20-21)

7 The ALJ found that during the closed period at issue, Whitney
8 had severe impairments consisting of bipolar disorder, and
9 degenerative disc disease of the lumbar spine. However, he found
10 that these impairments, individually or in combination, did not
11 reach the Listing level of severity, including Listing 1.04
12 (disorders of the spine) and Listing 12.04 (affective disorders).
13 (A.R. 21)

14 With regard to Whitney's mental impairment, the ALJ noted she
15 had mild restriction in the activities of daily living, moderate
16 difficulties in social functioning, and moderate difficulties with
17 regard to concentration, persistence, or pace. Her symptoms
18 improved with medication, and she had no episodes of decompen-
19 sation. The ALJ found that these levels of limitation did not
20 satisfy the "paragraph B" criteria of the Listing. (A.R. 21-22)
21 He further found that the evidence of record did not establish the
22 presence of the "paragraph C" criteria. (A.R. 22)

23 The ALJ made the following observations about the process used
24 to assess a claimant's mental residual functional capacity:

25 The limitations identified in the "paragraph
26 B" criteria are not a residual functional
27 capacity assessment but are used to rate the
28 severity of mental impairments at steps 2 and
3 of the sequential evaluation process. The
mental residual functional capacity assessment
used at steps 4 and 5 of the sequential

1 evaluation process requires a more detailed
2 assessment by itemizing various functions
3 contained in the broad categories found in
4 paragraph B of the adult mental disorders
5 listings in 12.00 of the Listing of Impair-
ments (SSR 96-8p). Therefore, the following
residual functional capacity assessment
reflects the degree of limitation I have found
in the "paragraph B" mental function analysis.

6 (*Id.*) The ALJ then found that during the closed period, Whitney
7 had the mental residual functional capacity "to perform a range of
8 light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b)
9 except due to symptoms of bipolar disorder or psychiatric medica-
10 tion, she could perform simple, routine tasks that involved no more
11 than occasional contact with the general public, co-workers, or
12 supervisors." (A.R. 23) With regard to Whitney's chronic back
13 pain, the ALJ indicated her work tasks "must involve no more than
14 6 hours of standing and/or walking during an 8-hour workday with
15 regular breaks. Her capacity to sit is not restricted, so long as
16 her seating includes lumbar support." (*Id.*)

17 The ALJ found that although Whitney's medically-determinable
18 impairments reasonably could be expected to cause her alleged
19 symptoms, Whitney's testimony regarding the intensity, persistence,
20 and limiting effects of her symptoms was not supported by the
21 objective medical evidence of record and, therefore, was not fully
22 credible. (A.R. 24) On the issue of Whitney's physical limita-
23 tions, the ALJ noted that simply because Whitney is unable to work
24 without experiencing some pain and discomfort does not satisfy the
25 test for disability. He found Whitney's credibility regarding her
26 back pain was "undermined by the fact that she was able to cope
27 with her pain symptoms without prescription pain medication.
28 Additionally, [she] has since resumed full-time work without any

1 reported physical therapy or surgical intervention." (*Id.*) The
2 ALJ found these facts indicate Whitney's pain symptoms were not as
3 severe as she alleged. (*Id.*)

4 In reaching this conclusion, the ALJ relied on Dr. Hills's
5 findings and assessment, which he found to be consistent with the
6 record as a whole. In addition, the ALJ gave Dr. Hills's opinions
7 the greatest weight because the doctor actually examined Whitney.
8 (*Id.*) He gave little weight to Gail Stadler's opinion regarding
9 Whitney's physical limitations because he found her opinion to be
10 inconsistent with the medical and other evidence of record.
11 (A.R. 25)

12 With regard to Whitney's mental functioning, the ALJ made the
13 following findings:⁷

14 With regard to the claimant's mental func-
15 tioning, the record documents [her] complaints
16 of anger and irritability, as well as the full
17 range of manic and depressed symptoms asso-
18 ciated with bipolar disorder. Licensed
19 psychologist Wendy Bourg, Ph.D., noted that
20 the claimant's mental symptoms interfered with
21 her social relationships and effective work
22 functioning. Dr. Bourg did not, however,
23 report that the claimant's mental symptoms
24 precluded all work. Treatment notes from the
25 relevant period indicate that the claimant
26 "responded well" to psychiatric medication, to
27 the point that she became "virtually symptom-
28 free." The claimant demonstrated improved
mood and was reported to talk and laugh "a
lot." I also note that the claimant's symp-
toms, particularly fatigue and irritability,
continued to manifest themselves later on -
but the record documents improvement after
adjusting medication and dosage. By June 2007,
the claimant had no specific complaints

⁷Whitney argues the ALJ erred in almost every respect in his
evaluation of her mental impairment. The court therefore finds it
useful to quote the ALJ's findings in full regarding his assessment
of Whitney's mental functioning.

1 regarding her mental symptoms. This evidence
2 suggests that the claimant's mental symptoms
3 impose limitations on the complexity of tasks
4 she can perform, as well as the social inter-
5 action required by such tasks. The claimant
6 acknowledged at hearing, however, that the
treatment and counseling she received from the
clinical trial administered by Dr. Bourg
helped improve her functional capacity to such
an extent that she was able to return to work
in July 2008.

7 State psychological consultants reviewed all
8 available evidence in May and October 2007 and
9 agreed that during the relevant period the
10 claimant remained capable of performing simple
11 tasks of 1-2 steps on a consistent basis, so
12 long as such tasks involved only occasional
contact with co-workers and the general
public. I give great weight to the assess-
ments provided by the State agency psycholo-
gists, as they are generally consistent with
the record as a whole.

13 I have reviewed the Third Party Function
14 Report submitted by the claimant's friend,
15 Gail Stadler, in May 2007. Ms. Stadler's
16 report of the claimant's . . . "chronic mood
17 swings" [is] generally consistent with the
18 evidence of record during the relevant period.
I give partial weight to Ms. Stadler's obser-
vations, to the extent they are consistent
with the residual functional capacity found
here.

19 (A.R. 24-25; citations to exhibits omitted)

20 The ALJ found that the demands of Whitney's past relevant work
21 exceeded her residual functional capacity, and she was unable to
22 perform her past relevant work during the closed period. However,
23 he further found that she could "perform a range of light work on
24 [a] sustained and competitive basis subject to the limitations and
25 restrictions set forth above," (A.R. 24), and she therefore could
26 make a successful adjustment to other work that existed in
27 significant numbers in the national economy, including semi-
28 conductor assembler, surveillance monitor, and meter reader. (A.R.

25-26) He therefore concluded Whitney was not disabled during the closed period at issue. (A.R. 26-27)

IV. STANDARD OF REVIEW

The court may set aside a denial of benefits only if the Commissioner's findings are "'not supported by substantial evidence or [are] based on legal error.'" *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black V. Comm'r of Soc. Sec. Admin.*, slip op., 2011 WL 1930418, at *1 (9th Cir. May 20, 2011). Substantial evidence is "'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

The court "cannot affirm the Commissioner's decision 'simply by isolating a specific quantum of supporting evidence.'" *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court must consider the entire record, weighing both the evidence that supports the Commissioner's conclusions, and the evidence that detracts from those conclusions. *Id.* However, if the evidence as a whole can support more than one rational interpretation, the ALJ's decision must be upheld; the court may not substitute its judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

/ / /

/ / /

1 **V. DISCUSSION**

2 **A. Evaluation of Mental Impairment**

3 Whitney argues the ALJ failed to comply with the applicable
4 regulations in his evaluation of her mental impairment. See Dkt.
5 #15, pp. 8-13. She argues the ALJ entirely failed to assess her
6 mental residual functional capacity as required by 20 C.F.R.
7 § 404.1520a(d), which provides that after the ALJ rates the degree
8 of a claimant's functional limitation resulting from mental
9 impairments, and determines whether or not any severe mental
10 impairment meets or equals a listed impairment, then the ALJ must
11 assess the claimant's mental residual functional capacity.

12 The ALJ found that Whitney's bipolar disorder during the
13 closed period resulted in mild restriction in her activities of
14 daily living, moderate difficulties in social functioning, and
15 moderate difficulties with regard to concentration, persistence, or
16 pace. (A.R. 21-22) He found that although the impairment was
17 severe, it was not of Listing-level severity. (A.R. 21) Pursuant
18 to the regulation, he then was required to assess Whitney's mental
19 RFC. 20 C.F.R. § 404.1520a(d). Whitney argues that instead of
20 actually performing an assessment, the ALJ leapt directly to the
21 conclusion that she possessed the mental residual functional
22 capacity to perform a range of light work involving simple, routine
23 tasks involving no more than occasional contact with the general
24 public, coworkers, or supervisors. (A.R. 23) Whitney argues this
25 mental RFC fails to address the ALJ's own finding that she
26 possessed moderate limitations in concentration, persistence, or
27 pace. See Dkt. #15, pp. 8-10; Dkt. #20, pp. 1-2. Whitney argues
28 further that the ALJ failed to address how her moderate deficits in

1 maintaining concentration, persistence, or pace "may affect her
2 ability to sustain unskilled work." Dkt. #20, p. 2 (emphasis in
3 original).

4 The Commissioner argues the ALJ properly relied on the state
5 agency consultant's Mental Residual Functional Capacity Assessment
6 and Psychiatric Review Technique forms, as directed by the Agency's
7 Program Operation Manual System (POMS) § DI 25020.010(B)(1).⁸
8 The Commissioner cites *Stubbs-Danielson v. Astrue*, 539 F.3d 1169
9 (9th Cir. 2008), in support of his contention that the ALJ was
10 entitled to rely on the consultant's narrative opinion, in which
11 Dr. Rethinger concluded Whitney "would do best performing tasks at
12 a consistent and unrushed pace," limited to the completion of
13 "simple 1-2 step tasks on a consistent basis in a normal 40 hour
14 work week." (A.R. 304)

15 The Commissioner's argument is well taken. In *Stubbs-*
16 *Danielson*, the plaintiff argued the ALJ's mental RFC finding failed
17 to "capture the deficiency in pace and other mental limitations
18 identified by [the medical sources of record]." 539 F.3d at 1173.
19 The court disagreed, noting the ALJ had translated the claimant's
20 limitations, including the limitation on pace, "into the only
21 concrete restrictions available to him"; i.e., those contained in
22 the consultant's narrative report. *Id.*, 539 F.3d at 1174.
23 Similarly, in the present case, the only "concrete restrictions
24 available" to the ALJ were those stated by Dr. Rethinger. The ALJ
25

26
27 ⁸The Commissioner provided a Westlaw citation to the POMS that
28 is not accessible under the court's, or many attorneys', subscrip-
tion agreement. However, the POMS is available to the public on
the Agency's website. See <https://secure.ssa.gov/appls10/>.

1 properly relied on Dr. Rethinger's written reports and narrative in
2 finding Whitney could understand, remember, and carry out short,
3 simple instructions on a sustained basis at an unrushed pace. The
4 ALJ concluded that Whitney possessed the mental residual functional
5 capacity to perform a range of light work involving simple, routine
6 tasks involving no more than occasional contact with the general
7 public, coworkers, or supervisors. This mental RFC assessment
8 adequately captured Whitney's deficiencies in concentration,
9 persistence, or pace. See *id.*, 539 F.3d at 1174 (citing, *inter*
10 *alia*, *Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir. 2001)
11 "(where state psychologist both identified claimant as having
12 deficiencies of concentration, persistence or pace and pronounced
13 claimant possessed the ability to 'sustain sufficient concentration
14 and attention to perform at least simple, repetitive, and routine
15 cognitive activity without severe restriction of function,' ALJ's
16 hypothetical including ability to perform 'simple, routine,
17 repetitive tasks' adequately[] captured claimant's deficiencies in
18 concentration[, persistence or pace)"). Thus, the court finds the
19 ALJ did not err in his assessment of Whitney's mental impairment
20 during the closed period at issue here.

21 The parties overlook an additional justification for the ALJ's
22 ultimate finding that Whitney's mental limitation did not result in
23 a finding of disability during the closed period. Even if one were
24 to assume *arguendo* that Whitney's mental limitations were suffi-
25 ciently severe to prevent her from working for a portion of the
26 closed period, the record does not contain substantial evidence to
27 support a finding that she was limited to that degree for a period
28 of 12 months or more, as required for a finding of disability. See

42 U.S.C. § 423(d)(1)(A). Whitney was at her worst, in terms of her bipolar disorder, at the beginning of the closed period, the first of November 2006, when she entered the clinical trial. By January 25, 2007, she reported being "virtually symptom-free." (A.R. 259) Although it took a few months to get her medications adjusted properly to relieve her fatigue, the record indicates this was accomplished by June 2007. From June 14, 2007, forward, there are no additional treatment records and no indication that Whitney's medications were changed. Nevertheless, by the following June, she felt able to return to full-time work. Thus, the record evidence indicates Whitney was severely limited by her bipolar disorder, if at all, only from November 2006 to June 2007.

B. Credibility Assessment; Third-Party Testimony

Whitney argues the ALJ improperly rejected her testimony, and the third-party testimony of Gail Stadler. She argues the ALJ erred in failing to provide clear and convincing reasons for rejecting her subjective complaints. Dkt. #15, pp. 13-16.

In *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996), a case relied upon by Whitney, the court observed that SSR 88-13 directs an ALJ

"to investigate all avenues presented that relate to subjective complaints, including the claimant's prior work record and information and observations by treating and examining physicians and third parties, regarding such matters as:

"1. The nature, location, onset, duration, frequency, radiation, and intensity of any pain [or other symptom];

"2. Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);

1 "3. Type, dosage, effectiveness, and adverse
2 side effects of any pain medication;
3 "4. Treatment, other than medication, for
4 relief of pain [or other symptoms];
5 "5. Functional restrictions; and
6 "6. The claimant's daily activities."

7 *Smolen*, 80 F.3d at 1284 n.8 (quoting SSR 88-13). An ALJ also "may
8 consider" whether a claimant has a reputation for lying, has made
9 prior inconsistent statements, or has failed to seek treatment or
10 to follow a prescribed course of treatment. *Smolen*, 80 F.3d at
11 1284 (citations omitted). An ALJ also must consider evidence
12 concerning a claimant's prior work history, observations by
13 treating and examining physicians, and observations by third
14 parties. *Id.*, 80 F.3d at 1285.

15 In the present case, the ALJ found that Whitney's medically-
16 determinable impairments reasonably could have been expected to
17 cause her alleged symptoms, and he made no finding that Whitney was
18 malingering or previously had made inconsistent statements. (A.R.
19 24) However, he found that Whitney's testimony regarding the
20 intensity, persistence, and limiting effects of her symptoms was
21 only partially credible, to the extent her allegations differed
22 from the RFC as found by the ALJ. (*Id.*)

23 As grounds for his credibility assessment, the ALJ found
24 Whitney's subjective complaints were not fully supported by the
25 objective medical evidence. He noted that although her degenera-
26 tive disc disease could result in "some chronic pain symptoms," the
27 record did not contain "evidence of disc herniation, nerve root
28 compression, or lumbar stenosis that commonly accompany disabling
29 back pain"; she had normal motor strength, sensation, and reflexes;
30 she walked without an assistive device, sat comfortably during her

1 examination, removed her shoes without difficulty, and transferred
2 easily from a chair to an examination table; and she was able to
3 cope with her pain symptoms using only over-the-counter
4 medications. (A.R. 24) He found that the "combination of
5 relatively benign objective findings and physical functioning [was]
6 inconsistent with an individual who has severe, debilitating back
7 pain." (*Id.*) He further noted Whitney "[had] since resumed full-
8 time work without any reported physical therapy or surgical
9 intervention[,] . . . suggest[ing] that [her] pain symptoms were
10 not as severe as she alleges." (*Id.*) Thus, the ALJ cited specific
11 evidence of record that he found contradictory to Whitney's
12 allegations regarding the severity of her pain and limitations.

13 Regarding Gail Stadler's observations, the ALJ found
14 "Stadler's report of [Whitney's] physical limitations and 'chronic
15 mood swings' [to be] generally consistent with the evidence of
16 record during the relevant period." (A.R. 25) However, he
17 discounted Stadler's opinions regarding Whitney's limitations to
18 the extent they were inconsistent with the medical and other
19 evidence of record. (*Id.*)

20 To the extent, if any, that the ALJ's assessment of Whitney's
21 subjective complaints and of Stadler's third-party report failed to
22 rise to the level of particularity required by Ninth Circuit case
23 law, *see Smolen, supra*, and other cases cited by Whitney in her
24 brief, Dkt. #15, p. 15, any such failure was harmless error. As
25 noted in the previous section of this opinion regarding Whitney's
26 mental impairment, even assuming Whitney's physical symptoms were
27 as severe as she alleges, the record evidence does not establish
28 that those symptoms were disabling; i.e., that they lasted for a

1 period of 12 months or more. The ALJ's ultimate determination that
2 Whitney was not disabled during the closed period is supported by
3 substantial evidence in the record, even if Whitney's and Stadler's
4 testimony is given substantial weight.

5
6 ***C. Step-Five Finding***

7 Whitney argues the ALJ erred, at step five of the sequential
8 evaluation process, in finding she was able to perform the jobs of
9 semiconductor assembler, surveillance monitor, and meter reader.
10 She argues all three of those jobs require a level of reasoning
11 that is inconsistent with the ALJ's mental RFC finding that Whitney
12 was limited to simple, routine tasks involving only one or two
13 steps. Dkt. #15, pp. 18-20.

14 The Commissioner notes Whitney has not cited any case law in
15 support of her claim that a person who can perform simple tasks
16 involving only one or two steps cannot perform jobs requiring a DOT
17 reasoning level of 3. The Commissioner asserts that this court has
18 held "a claimant restricted to simple work can in fact perform
19 reasoning level 3 occupations." Dkt. #17, p. 23 (citing *Wentz v.*
20 *Astrue*, No. CV08-661-PK, 2009 WL 3734104, at **13-14 (D. Or.
21 Nov. 4, 2009) (King, J.)). The undersigned does not read the *Wentz*
22 holding as broadly as the Commissioner suggests. The *Wentz* court's
23 holding was based on the specific evidence of record in the case,
24 where the ALJ's mental RFC was formulated "to accommodate mild
25 limitations in concentration, persistence, or pace due to
26 distractions from pain and the effects of sleep difficulties," but
27 expressly "was not based on deterioration in *Wentz's* cognitive
28 function[.]" *Wentz*, 2009 WL 3734104, at #14. Here, unlike in

1 Wentz, the record contains evidence that Whitney's cognitive
2 functioning was deteriorated for a portion of the closed period.

3 The Commissioner further argues, however, that the DOT's
4 "reasoning level" classification for the jobs identified by the VE
5 is not controlling, and can be rebutted by contradictory expert
6 testimony. Dkt. #17, p. 24 (citing *Johnson v. Shalala*, 60 F.3d
7 1428, 1435 (9th Cir. 1995) ("We make explicit here that an ALJ may
8 rely on expert testimony which contradicts the DOT, but only
9 insofar as the record contains persuasive evidence to support the
10 deviation.")). The ALJ specifically questioned the VE in this case
11 about conflicts between his opinions regarding the skill level
12 required for the cited jobs and that listed in the DOT. The VE
13 explained that he was relying on more recent publications,
14 including publications by the State of Oregon Employment
15 Department, which indicated the identified jobs actually should be
16 classified as unskilled. (A.R. 70-71) Because the VE gave a
17 reasonable explanation for his deviation from the DOT, the ALJ was
18 entitled to rely on the VE's opinion regarding jobs Whitney could
19 have performed during the closed period. See *Massachi v. Astrue*,
20 486 F.3d 1149, 1152-54 (9th Cir. 2007).

21 The court finds the ALJ did not err in relying on the VE's
22 testimony regarding jobs Whitney would have been capable of
23 performing during the closed period at issue.

24 25 **CONCLUSION**

26 The court has the power to enter a judgment affirming,
27 modifying, or reversing the Commissioner's decision, with or
28 without remand for further proceedings. 42 U.S.C. § 405(g). In

1 the present case, the record contains substantial evidence to
2 support the ALJ's conclusion that Whitney was not disabled during
3 the closed period. As a result, the Commissioner's decision should
4 be affirmed.

5
6 **VII. SCHEDULING ORDER**

7 These Findings and Recommendations will be referred to a
8 district judge. Objections, if any, are due by **February 6, 2012**.
9 If no objections are filed, then the Findings and Recommendations
10 will go under advisement on that date. If objections are filed,
11 then any response is due by **February 23, 2012**. By the earlier of
12 the response due date or the date a response is filed, the Findings
13 and Recommendations will go under advisement.

14 IT IS SO ORDERED.

15 Dated this 17th day of January, 2012.

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18 /s/ Dennis James Hubel
19 Dennis James Hubel
20 Unites States Magistrate Judge
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